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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. [redacted] 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,

Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN REPLY TO SUGGESTIONS OF THE SOLICITOR GENERAL

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July, 1967

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1156

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,

Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN REPLY TO SUGGESTIONS OF THE SOLICITOR GENERAL

ANALYTICAL STATEMENT

It is assumed that the Solicitor General, in writing his Memorandum for this Court, was speaking for, or as the direct result of contact with, someone at some level in the Department of Indian Affiairs. We say this respectfully but candidly because of the confusion engendered and created by the several things which our analytical consideration of the Memorandum discloses:

1. The obviously non-legal approach to the question of "rights" of the respective parties as distinguished from their personal "capacities";

2. The failure to distinguish between (a) want of "capacity" to sue and (b) the absence of possession of legal enforceability of a particular "right";

3. The failure to distinguish between (a) a statutory right granted to members of the Five Civilized Tribes and (b) the express denial of such a right by statute and regulations (having the force of statutes) to restricted members of the Comanche Tribe;

4. Complete disregard of procedural requirements under the code of civil procedure of the State of Oklahoma;

5. The failure to recognize that an action for damages for "waste" would be an action involving an interest in land and for injury to land and thus not maintainable in Oklahoma County, Oklahoma;

6. The assumption of a fact not shown by the record and at war with reality and law, *i.e.*, that the "Secretary" consented to the maintenance of the action by the restricted Indians;

7. Complete disregard of the requirement, plainly stated, for precedent use by the Indians of a valid and effective administrative remedy;

8. Complete disregard of the right of the respondent-lessee to comply with, obey and rely upon operations supervision by the "Supervisor" under the plain terms of the lease contract and of the Regulations;

9. Complete disregard of the required end-result of any litigation permitted in that it is now to be seen without doubt that plaintiffs could not recover any relief in this action; and

10. Complete disregard of the destructive effect upon governmental regulation of the affairs of the restricted Indians which the effective application of the Solicitor General's opinion and suggestion would inevitably bring about.

Brief statements contained in the Memorandum of the Solicitor General under appropriate headings and relating to the particular matters of discrimination above suggested will be set out hereinafter.

ARGUMENT AND AUTHORITIES

1. "Capacity to sue" and "right of enforcement" are not to be equated.

The Solicitor General suggests (S.G. Mem.)* that we would have the plaintiffs assigned to the category of "children," "insane" and wholly incompetent. Such could not be further from the truth. The Solicitor General confuses "capacity to sue" (S.G. Mem. 2, 3, 4) with "right to litigate" in the exercise of a particular judicial remedy. We merely assert and have asserted only that by the terms of the very contract sued on and the very law under which it came into existence and continues in force, the particular remedy sought to be used by plaintiffs is interdicted as to them.

The Supreme Court of Oklahoma was very careful to recognize the distinction here stressed, and contrary to the Solicitor General's assertion (S.G. Mem. 2) did not find,

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* NOTE: References herein are to (Pet. Cert.), Petition for Certiorari; (Br. Opp.), Brief in Opposition to Certiorari; (S.G. Mem.), Solocitor General's Memorandum; and (R.), the Record.

state or decide that plaintiffs "lacked capacity to sue," saying instead consistently that plaintiffs' "right to sue" on this contract and "right to prosecute" and "right to maintain" *this action* did not exist.

In this posture, the decisions in *Heckman* v. *United States,* 224 U.S. 413, 442-446 (1912), and *Choctaw and Chickasaw Nations* v. *Seitz,* 193 F.2d 456 (10th Cir., 1951), upon which the Solicitor General places chief reliance (S.G. Mem. 3), do not support his conclusion. The very statutes and regulations applicable to the Comanches, including Petitioners here, expressly contradict the Solicitor General's conclusion that by the decision in *Heckman,* the "purpose" of the Government's control, "trusteeship" or "guardianship" is limited to preventing "improvident conveyances" (S.G. Mem. 2).

As pointed out (Pet. Cert. 7) and (Br. Opp. 7-8) the *Heckman* and *Sadler* cases involved lands of the Five Civilized Tribes, to which different specific statutes applicable only to members of those Tribes apply. The same is true of *Choctaw and Chickasaw Nations* v. *Seitz* which involved only a suit by Indian *Nations.* All three of these cases involved *title* to the lands themselves and in neither was involved enforcement by court action of a *contract* which (with the law supporting it) plainly required that it could be sued on only by the "trustee" or "guardian" itself. In addition, in the *Sadler* case, the United States actually intervened and prosecuted the claim.

Many decisions of this and other courts support the views here expressed. They are cited at pages 6 and 7 of Respondent's Brief in Opposition to Petition for a Writ

of Certiorari now on file herein, to which pages and citations we now respectfully refer.

We make no claim, and the Oklahoma courts did not hold, that the Indians were or are incapacitated to sue in a state court in a *proper* case upon a *proper* cause of action assertable by them. We are not in disagreement with the decisions relied upon by Petitioners. But it needs to be noted that those cases all deal with factual situations and claims entirely different from those in the case at bar. We make no distinctions between state and federal courts as to jurisdiction. The rules we contend for apply to whatever court of record in which the suit may have been filed. We do not claim that plaintiffs have no standing to appear as litigants. We simply say, as held by the Supreme Court of Oklahoma in the instant case and by Judge Kennamer in *Seber* v. *Spring Oil Co.*, 33 F.Supp. 805 (D.C., Okla. 1940), that these Petitioners are not the ones authorized by law and the contract which is the basis of the action to seek the relief. The law and the contract forbid it. Though such does exist here, it is not even necessary to recognize a distinction between a restricted Indian, as plaintiff, and an unrestricted non-Indian or white man, *under the same conditions*. If an unrestricted white man (and especially if at the time of suit he is under trusteeship or guardianship) had made a lease agreement containing all the covenants and provisions which the departmental lease in suit here contains (vesting complete discretion and control in another), the rule which we contend for would be equally applicable to him.

At this point, we suggest that it is significant to consider that under the provisions of the lease itself "royalties"

are to be paid only to the "Superintendent" and on oil, gas and hydrocarbon substances *"produced and saved"* and that "oil, and/or gas used by the lessee for development and operational purposes on said lease, * * * shall be 'royalty free'." [Par. 3(c), R., C-M. 11]

The distinctions above suggested and the effect of the lease provisions last above referred to will be further commented upon hereinafter.

2. If the judgment below is right for any reason, it must not be disturbed.

It is well established that if a judgment appealed from is right for any reason or upon any legal basis, it must be permitted to stand. *Witmer* v. *United States*, 96 F.2d 745, 746 (3rd Cir., 1938); *Hall* v. *Deal*, 205 Okla. 46, 234 P.2d 384, 389 (1951); *Wilson* v. *Berryhill*, 181 Okla. 213, 73 P.2d 449, 453 (1937).

The judgment of the trial court in the case at bar was affirmed by the Supreme Court of Oklahoma in its entirety. It was affirmed, not only for the reason that (1) plaintiffs had no right to prosecute or maintain the action because of their contract and the federal law applicable thereto, but also because (2) the pleadings disclosed that plaintiffs could not recover on the merits (a) because they were not the real parties in legal interest, and (b) defendant had done nothing in violation of the contract, and (c) there had not accrued any unpaid liability or obligation for the payment of "royalty" under the lease or otherwise (Appendix B to Petition, pp. iii, ix, x-xi; Syllabus 2 by the Supreme Court of Oklahoma).

Under the code of civil procedure of Oklahoma a "demurrer" raises every legal question arising out of and apparent from the face of the pleading which is dispositive of the case as far as the instant pleading is concerned. And if it appears as a matter of law that there can be no recovery upon the basis of such pleading or upon proper judicial notice, factually or legally, the demurrer must be sustained. A demurrer does not admit the truth of conclusions of law or statements of fact themselves disproved or rendered immaterial upon the face of the pleading or controlling exhibits. *Southern Surety Co.* v. *Municipal Excavator Co.*, 61 Okla. 215, 160 Pac. 617, 619 (1916); *Williams* v. *Phillips Petroleum Co.*, 406 P.2d 474, 477 (Okla. 1965); *Savage* v. *Woods*, 268 P.2d 858, 860 (Okla. 1954); *State ex rel Nesbitt, Attorney General* v. *Liberty National Bank and Trust Co.*, 414 P.2d 281, 284-285 (Okla. 1966); *Diehl* v. *Phillips Petroleum Co.*, 376 P.2d 203, 206 (Okla. 1962); *Wilson-Harris* v. *Southwest Tel. Co.*, 193 Okla. 194, 141 P.2d 986, 989-990 (1943).

And to like effect is a now authorized motion for summary judgment upon the whole record, Oklahoma Supreme Court Rule No. 13, which is substantially the same in its provisions as those in Federal Rules of Civil Procedure, Rule No. 56(a), (b), (c) and (e). Such Oklahoma Rule will be further referred to hereinafter.

Again, the Oklahoma code provides for limitations upon venue. While an action upon a simple contract, neither involving an interest in real property nor damage to land, is transitory and may be brought wherever the defendant may be properly served with process, an action in contract

or otherwise for recovery of damages to land or involving tortious or illegal use thereof must be brought in the county where the land lies. 12 O.S.A. 131 reads in part:

> "Actions for the following causes must be brought in the county in which the subject of the action is situated, * * *:
>
> "1st, For the recovery of real property, or of any estate, or interest therein, or the determination in any form of any such right or interest.
>
> * * * * * *
>
> "5th, For all damages to land, crops, or improvements thereon, action must be brought in the county where the damage occurs."

—*Atchison, Topeka & Santa Fe R. Co.* v. *Superior Court of Creek County, Oklahoma,* 368 P.2d 475 (Okla. 1962);

Fox v. *Superior Court of Creek County, Oklahoma,* 368 P.2d 484 (Okla. 1962);

Ross v. *District Court of Oklahoma County, Oklahoma,* 199 Okla. 573, 188 P.2d 861 (1948);

McCully v. *McCully,* 184 Okla. 264, 86 P.2d 786 (1939);

Sinclair Prairie Oil Co. v. *District Court of Pottawatomie County, Oklahoma,* 180 Okla. 455, 70 P.2d 94 (1937).

Any contrary decisions by the Supreme Court of Oklahoma were prior to the 1957 amendment to 12 O.S.A. 131 which added paragraph 5th.

This explains the significance of the express limitation of this suit by counsel for the plaintiffs to one *on the contract* (Br. Opp. 3). Faced with a preliminary motion re-

quiring election, plaintiffs' counsel elected formally and conclusively to proceed *ex contractu* because they knew that an action for "waste" would have to be instituted, if at all, in Stephens County, Oklahoma, where the leased land was located and that in such case their pending suit in Oklahoma County would have to be dismissed for want of venue. In this connection, please bear in mind that the only action which could be brought upon the lease to recover "royalty" [Lease, par. 3(c); C-M. 11], was for a percentage of "oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased," specifically excepting oil and/or gas used by the lessee for development and operational purposes on the lease, "which oil or gas shall be 'royalty free.'" For unauthorized "waste" of gas, recovery by the Secretary was limited to 5¢ per 1,000 feet.

Thus, in speaking of an action for "waste" and to "protect their interests in allotted lands" (S.G. Mem. 1, 3 and 4), the Solicitor General failed to take account of this and failed to recognize that an action for "waste" was not really the type of action here involved, so his conclusion that this action could be maintained by the Indians flies in the face of mandatory provisions of the Oklahoma code which must be respected by this Court.

Another significant provision of the Oklahoma code to which the attention of the Solicitor General was not directed is that requiring the action to be prosecuted in the name of the real party in interest. 12 O.S.A. 221 reads in part:

> "Every action must be prosecuted in the name of the real party in interest, * * *."

The tests for application of the Statute, with citations of Oklahoma cases announcing them, are now briefly discussed.

A defendant has the right to have a cause of action prosecuted against him by all of the real parties in interest, and all parties united in interest as parties plaintiff in the subject matter of the litigation must be joined as plaintiff. *Haught* v. *Continental Oil Co.*, 192 Okla. 345, 136 P.2d 691 (1943); *Stinchcomb* v. *Patterson*, 66 Okla. 80, 167 Pac. 619 (1917).

The "real party in interest" in an action is the one legally entitled to take the proceeds of a claim in litigation. The test of whether one is the real party in interest is: Does he satisfy the call for the person who has the right to control and first receive the fruits of the litigation? *Johnson* v. *Harris*, 187 Okla. 239, 102 P.2d 940 (1940); *Okmulgee Coal Co.* v. *Hinton*, 95 Okla. 92, 218 Pac. 319 (1923); *Stinchcomb* v. *Patterson*, 66 Okla. 80, 167 Pac. 619 (1917); *Conley Drilling Company* v. *Rogers*, 191 Okla. 667, 132 P.2d 959 (1943); *Schoenfeld* v. *Blair*, 366 P.2d 414 (Okla. 1961).

Another test for determining whether or not an action has been brought and is being prosecuted by the real party in interest is whether a judgment for or against the plaintiff in the action would protect defendant from an action upon the same demand by another. *Moore* v. *Casing Brothers*, 202 Okla. 252, 212 P.2d 460 (1949); *American F. & C. Co.* v. *All American Bus Lines*, 179 F.2d 7 (10th Cir., 1949); *Joplin* v. *Ely*, 365 P.2d 735 (Okla. 1961).

3. No effective "consent" was or could have been given by the "Secretary" for the plaintiffs to maintain this suit.

The Solicitor General has probably been led into an unguarded assumption of "consent" by the "Secretary" to the maintenance of this action by the plaintiffs, Petitioners here (S.G. Mem. 2, 3, 4) by the inaccurate reference to "consent" by the Supreme Court of Oklahoma (Appendix B to Petition, p. xi) while specifically holding that there was no effective "consent." In truth, there was no consent by the Secretary or otherwise.

The "consent" (not now urged by Petitioners) referred to is found in a letter dated April 6, 1962 signed by "Will J. Pitner, Area Director," purporting to approve an attorney's contract between Houston Bus Hill and the Petitioners herein (R., C-M. 71, 65-70). It is to be noted that while this suit was instituted in the District Court of Oklahoma County, Oklahoma, on the 9th day of August, 1961, the letter referred to is dated nearly a year later and it does no more than to "approve" the attorney's contract upon conditional terms. The language of this co-called "approval" shows that it does not even purport to be an attempted consent by the Secretary of the Interior that the action may be maintained by the Indians in lieu of the United States or in lieu of the Secretary.

The so-called "approval" by Pitner says *only* that *if* the suit is maintained and *if* the suit is successful in that a recovery is had for the plaintiffs and *if* funds are then available, payment will be made by the Department upon a "quantum meruit" basis.

Thus, this was obviously not even an attempt to grant authority to sue nor an attempt to waive the Federal Gov-

ernment's exclusive rights reserved in the lease, in the law and in applicable regulations, and such was never intended. The effect of the letter is simply and solely to say that "if you do prosecute the action successfully and benefit the Indians, we will allow you to be paid a reasonable fee for what you have accomplished." While plaintiffs had the right to choose counsel and to contract with counsel for whatever purpose they wished, such choice of counsel did not and could not authorize the institution and maintenance by them of a cause of action which they otherwise were not legally entitled to maintain. And no approval of such choice could amount to such authority or to delegation of authority exclusively resting in the United States. In no event could such approval, *in the absence of formal removal of restrictions*, authorize counsel to be appointed by the Indians to appear for them nominally but in reality to represent the United States of America in an action which only it could bring.

The restrictions upon these Petitioners have never been removed. There is no indication of any kind of an intent, purpose or attempt to waive, modify, repeal, set aside, diminish, relinquish or release any of the restrictions imposed by the departmental lease and the regulations to permit the Indians to assert those rights vested exclusively in the Secretary of the Interior, or to have paid to the Indians any of the benefits of the lease or income or emoluments flowing therefrom or thereunder. If there had been any such intent, it would have been a simple matter to have expressly said so or to have brought about a "removal" of restrictions by the Secretary of the Interior. But neither was done.

Conditional agreement to pay a fee for services of an attorney, or even for that matter, conditional consent to employment of counsel for a case does not and cannot waive or change the established law of contract that the suit must be instituted and maintained by the party who can legally recover, who is legally entitled to receive the amount sued for and is thus the real party in interest.

Even if it had been the intent of the "Area Director" to authorize the plaintiffs to bring this suit, such would be wholly ineffective for at least three reasons: (1) The only legal way to have done so would have been under Lease, paragraph 6 (R., C-M. 11) of the lease by removal of restrictions, and (2) the letter of Will Pitner is without legal effect to change established law, the statutes of Oklahoma, the decisions of the Supreme Court of Oklahoma, the federal statutes and the rules and regulations of the Secretary of the Interior, or any of them, and (3) no officer or agent of the federal government not expressly authorized to do so can waive the exclusive rights of the United States to institute or not to institute litigation, and no officer of the United States can by *ex post facto* act, destroy, ignore or obliterate the accrued property rights of a party with whom it has dealt in good faith. The jealousy with which the courts guard the Government's exclusive right to submit questions (affecting rights of its Indian wards) to litigation is exemplified in *Minnesota* v. *United States,* 305 U.S. 382 (1939).

The Court's attention is specifically called to the following express language of Lease paragraph 6 referred to above to which the Indian lessors themselves *agreed.*

After reciting the exclusive control of the Secretary of the Interior before restrictions are removed, the paragraph terminates with the following language:

> "Provided, that after restrictions are removed the lessor shall have and be entitled to any available remedy in law or in equity for breach of this lease by the lessee."

Thus, even if there had been an express, unambiguous "consent," this could not change the contract nor the law established with respect to it so as to divest the Secretary of the Interior of the cause of action which rested solely in him or in the United States under his direction. And certainly, it will not be presumed that *after the fact* the Government of the United States through its Secretary of the Interior would breach its contract with the respondent-lessee, Skelly Oil Company, by affirmatively permitting an action to be brought which both the Secretary and the Indians had agreed would not be brought, and that based upon a claim arising from full and complete performance of the contract under the controlling directions of the Secretary of the Interior. Only the Secretary of the Interior had the right to determine the affirmative as well as the negative, *i.e.*, whether (1) the United States would institute an action against the respondent, or (2) would not do so, and it has obviously determined upon the negative.

The Supreme Court of Oklahoma was entirely right in holding and deciding that effective consent to the institution of this action by the Indians themselves had not been given.

4. Requirement for exercise of administrative remedy may not be ignored.

It is strikingly significant that the Solicitor General's Memorandum takes no cognizance at all of the administrative remedy expressly afforded to the Indians through and by means of which they could and were required to seek the very relief which they now demand, and *through this means* reach the judicial review stage, if that should prove necessary. The nature and course of such a remedy is fairly exemplified in *California Co.* v. *Seaton, Secretary of the Interior*, 187 F.Supp. 445 (D.C., D.C. 1960).

The provisions for this remedy in the regulations of the Secretary are set out on page 12 of our Brief in Opposition to Certiorari as are the citations of authorities indicating that these provisions and this remedy cannot be ignored and are required precedent to access to the courts by the Lessor-Indians.

We respectfully urge the Court to consider those pages and citations in connection with the Solicitor General's Memorandum.

5. Compulsory compliance by Lessee with operational requirements of "Secretary" clothed Lessee with protection against adverse claims of Indian wards growing out of such compliance.

At pages 3 and 4 of his Memorandum appears this statement by the Solicitor General:

> "In the present case, the terms of the lease relating to waste, when read against the pertinent rules of the Secretary, clearly vest in his subordinates broad discretion and control over the lessee's operations (see

Br. in Opp., App. pp. iii, vii-viii). If the lessee fails to operate in conformity with the directions of the federal supervisors and waste results, the Secretary will, of course, be quick to institute his own action to enforce the lease; his standing to do so is established by *Heckman* v. *United States, supra. If the lessee does comply, as was believed by the responsible officials of the Department of the Interior to be the case here,* the likelihood of a successful suit by the Indian lessor charging violation of the lease is plainly remote; accordingly, such suits are rarely brought. But should the Indian disagree with the federal supervisors and believe the lease was violated, the Secretary will normally, as here, consent to the Indian's bringing his own suit." (Italics supplied.)

As inherent in the action of the trial court and as expressly stated by the Supreme Court of Oklahoma, there is here no charge that the Lessee, Skelly Oil Company, failed, neglected or refused to operate the lease in conformity with directions of the federal supervisors and, stated in accord with the belief of "the responsible officials of the Department of the Interior," it actually did comply with such directions, the United States having determined not to sue and having refused an invitation to come in and take this case over.

Conceded that this lessee contracted in good faith with the Indian-lessors and the Secretary of the Interior, and thus with the United States, that it would comply exclusively with the directions of the supervisory officials of the Department in the operations of the lease, in return for which it was given assurance that if it did so, it would be free of interference and litigation by the Indian-lessors

as long as the Secretary had not removed restrictions upon the Indians, what kind of law would it be which would say that notwithstanding, the Indian-lessors, being still restricted, may "disagree" with the decisions and directions of said supervisors *after compliance therewith* and seek to recover damages or whatnot from the lessee for doing that which the supervisors had approved and/or directed? Would such not be an impairment of the obligation of contract? Would such be either moral or just?

Would it not be a form of judicial or legal oppression to adhere to and enforce a pronouncement that even though it is clear from the pleadings that a party cannot succeed, he must be afforded an opportunity by a trial to secure a favorable judgment which would run afoul of the law, or at least needlessly and futilely punish an innocent adversary by requiring a defense at great cost and expense?

In connection with the above, please see *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 338 (9th Cir., 1956), and *United States* v. *Barnsdall Oil Company*, 127 F.2d 1019 (10th Cir., 1942), with other cases cited at pages 10-11 of Respondent's Brief in Opposition to Certiorari.

More than this, it would be a futile and useless thing to grant certiorari or to reverse the judgment herein since under the above authorities it could only terminate in the same end-result. A summary judgment on the merits, under Oklahoma Supreme Court Rule No. 13, would have to be entered based upon the supervisor's approval and his testimony now of record in the cause by his deposition given pursuant to the Secretary's consent.

6. Permitting maintenance of this suit to possible recovery against the Lessee would set a precedent resulting in destruction of governmental regulation.

The Solicitor General says, as quoted above, that the normal policy of the Secretary is to consent to the Indian's bringing suit if he "disagrees" with the Department's previous decisions.

Under an announced and effective policy such as this what lessee would be willing to enter into a departmental lease? Such lease would require it to abide by the regulations, follow directions of the supervisor and/or operate with his approval, knowing that if the restricted Indian "disagreed," for any reason, after accomplishment, the lessee could be and probably would be sued by the Indian-lessor. This would be so even though what had been done was not the result of the lessee's own choice or judgment. In each case, in each instance, and in any event the lessee would be required to protect itself by insistence upon formal concurrence by the lessor in every decision made by the supervisor. How could a lessee operate otherwise to protect itself against the clear and ever constant hazard?

As in this case, (1) where there was no market for the gas, (2) adjoining oil wells were and would be draining oil from the Indians' lands unless produced from the Aitson lease, and (3) the only way to produce it was by the gas pressure and flow, and (4) where by flaring the gas large sums of oil royalty money were secured and paid to the Superintendent for the benefit of the Indians (which would not have been otherwise paid or obtained), and (5) this with the approval and concurrence of the supervisor, can

the restricted Indian-Lessors "disagree" with the supervisor and sue the lessee for that gas which was necessarily used *on the lease* for the benefit of the lessor?

If the answer to the last question propounded should be in the affirmative, the whole elaborate scheme of guardianship and regulation for the restricted Indian ward in connection with leasing of his mineral interests is doomed. Every decision and direction of the supervisors could be challenged and nullified and it is certain that each unprofitable or ill-advised one would be. No lessee could operate under such a policy.

CONCLUSION

It is urged that for the many reasons set forth above the suggestions of the Solicitor General are neither based upon adequate legal support nor upon adequate consideration of all present factual, legal and historical factors. We maintain that review upon certiorari is not called for and that the pending application for the Writ should be denied.

Respectfully submitted,

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July, 1967